"holder" includes (i) the original payee of a bill, and (ii) a banker who is a mere agent for collection: *Sutters* v. *Briggs,*[3] a decision on the term "holder" in the Gaming Act, 1855, section 2 (repealed), but the definition of the term was argued and adjudged with reference to the Bills of Exchange Act, 1882.

The learned judge relied on the *Jade International* case[3] which he considered to be an authority for the proposition that a drawer of a bill of exchange who after negotiating it and who later becomes a holder following the dishonour of the bill by non-payment is entitled to sue defendant as acceptor of the said bill. Further, the English Bills of Exchange Act, 1882 is substantially identical to our Bills of Exchange Act, 1949 — Act 204 (Revised — 1978). We have no reason to interfere with the decision of the learned judge that respondents have the capacity to sue appellants. Accordingly, we would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Chong Brothers; Chan, Jugah, Wan Ullok & Co.*

YAP PHOOI YIN & ANOR. v. C.M. BOYD

[F.C. (Raja Azlan Shah Ag. L.P., Lee Hun Hoe C.J. (Borneo) & Mohamed Azmi J.) November 3 & 13, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 135 of 1978]

Landlord and Tenant — Lease — Construction of — Relative importance of recital and operative part — Rent payable — Special case referred to High Court.

Arbitration — Special case referred to High Court.

In this case the proprietor of the land executed a lease of the land to the lessee. A cinema had been erected on the land by the lessee at his own expense some time before the execution of the said lease.

The recital of the lease stated that "the said land together with the buildings erected thereon and known as Star Theatre" was leased to the lessee for 30 years at a monthly rental as stated in the lease. The operative part of the clause provided that "the rent of the said land" shall from the beginning of the 21st year to the end of the 25th year be such sum as shall be agreed to by the parties or as shall be fixed by an arbitrator.

As there was disagreement as to the rent, the matter was referred to arbitration. The respondent as arbitrator gave his final award but referred it to the High Court in the form of a special case as follows:—

> "(1) In the event of the court deciding that the rental under Clause 1(iv) of the said lease should relate to the land only the fair rental under Clause 1(iv) of the said lease is $5,000 per month.
>
> (2) In the event of the court deciding that the rental under Clause 1(iv) of the said lease should relate to the land together with the buildings erected thereon the fair rental under Clause 1(iv) of the said lease is $21,000 per month."

Harun J. in the High Court answered the reference with the words "on the land only". The appellant appealed.

Held, allowing the appeal: (1) in the present case the recital of the lease was clear and particular while the operative part was ambiguous. The recital which is clear must determine the operative part which appears ambiguous;

(2) the rental should therefore relate to the land and the buildings erected thereon.

Cases referred to:-

(1) *Larrinaga & Co.* v. *Societe France-Americaine* (1923) 92 L.J.K.B. 455; 125 L.T. 65.

(2) *Ponsford & Ors.* v. *H.M.S. Aerosols Ltd.* [1978] 2 All E.R. 837.

(3) *Ex parte Dawes, In re Moon* (1886) 17 Q.B.D. 275, 286.

FEDERAL COURT.

Wong Chong Wah for the appellants.

M. Shankar for the respondent, Goh Eng Wah.

C. Das for the respondent — arbitrator.

Cur. Adv. Vult.

Raja Azlan Shah Ag. L.P. (delivering the judgment of the Court): In this appeal the question arises as to the construction of a lease executed on August 16, 1957 and it turns upon the relative importance of a recital and the operative part of the said lease in clause 1(iv) infra. The recital states that the registered proprietor of land held under C.T. No. 15741 for lot No. 573, section 62, in the town of Kuala Lumpur, in area 0 acres 2 roods 27.9 poles (hereinafter referred to as "the said land") do hereby lease to Makhanlall (Properties) Ltd. the said land together with the buildings erected thereon and known as Star Theatre as tenant for 30 years at a monthly rental as stated hereinafter, subject to the agreement and powers implied in the Land Code and subject to the stipulations, modifications, terms and conditions hereinafter contained. Then the lease continues with the operative parts. Clause 1 contains the provisions for rent. It reads:

"The rent of the said land shall be as follows:—

(iv) From the beginning of the 21st year to the end of the 25th year such sum exceeding $700 as shall be agreed to by the parties hereto or as shall be fixed by an arbitrator."

Clause 2 says that the rent shall be payable in advance.

Clause 3 contains the lessee's usual covenants for the maintenance of the Star Theatre, insurance of the said building in the joint names of the lessor or lessee, entry of the premises to view the state of repairs and provisions against assignment, sub-letting or part with possession without consent, and delivery of vacant possession with all fixtures fittings and additions. Clause 4 contains the lessor's covenants for quiet and peaceful enjoyment and option for renewal. Clause 5 provides for determination of the lease and taking possession of the said cinema and all other buildings erected by the lessee on the said land when rent is unpaid in certain circumstances. Clause 6 provides for the suspension of rent when the lessee is unable to operate or use the said cinema by reason of war, riot, civil commotion or fire. Clause 7 provides for arbitration in case of dispute or difference between the parties.

It is common ground that the said cinema was erected by the lessee at his own expense some time before the execution of the said lease. Both the signatories are now dead. There is now a dispute as to the amount of rent payable in the light of clause 1(iv). The matter went to arbitration. The arbitrator gave his final award (see *Larrinaga & Co.* v. *Societe*

France-Americaine[1]). He then referred it to the High Court in the form of a special case, which is as follows:

"(1) In the event of the court deciding that the rental under Clause 1(iv) of the said lease should relate to the land only the fair rental under Clause 1(iv) of the said lease is $5,000 per month.

(2) In the event of the court deciding that the rental under Clause 1(iv) of the said lease should relate to the land together with the buildings erected thereon the fair rental under Clause 1(iv) of the said lease is $21,000 per month."

Harun J. in what must surely be the shortest judgment on record, answered it with the words 'on the land only'.

The question which we have to decide is whether the operative part of the said lease, that is clause 1(iv) stands unaffected by the recital or whether the recital governs the terms of clause 1(iv). We do not pretend to speculate whether the parties really intended to include the said cinema building in assessing rent, except so far as we can gather their intention from the recital and the operative part of the said lease. We feel that the said lease must be construed as it stands, by what appears on the face of it, and nothing else. We are not now considering any question of rectification. If that is so, we should have to admit evidence which is not admissible on the question of construction. In the circumstances neither the Ponsford type of situation (see *Ponsford & Ors.* v. *H.M.S. Aerosols Ltd.*[2]) nor the maxim *quicquid plantatur solo, solo cedit* (see the definition of "land" as defined under section 5 of the National Land Code) applies in this case. In our view the rule to be applied to the construction of the lease has been stated with clarity by Lord Esher M.R. in *Ex parte Dawes, In re Moon.*[3] It is one entirely reasonable in itself, fundamental and long established.

"Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operatice part are clear, but they are inconsistent with each other, the operative part is to be preferred."

It seems to us that the present case falls within the first rule, i.e. where the recital is clear and the operative part is ambiguous. In the present case the recital is clear and particular; it refers to the said land together with the buildings erected thereon and known as Star Theatre. But the operative part, "The said land" in clause 1(iv) is perhaps ambiguous because it does not show whether the basis of the valuation is the land only or the land and the Star Theatre. Therefore it seems to us that the recital which is clear must determine the operative part which appears ambiguous.

The appeal is allowed with costs here and below.

Appeal allowed.

Solicitors: *Skrine & Co.; Shearn & Delamore; Shook Lin & Bok.*

TOH HOCK THYE & ORS. v. TOH CHWEE BIOW

[F.C. (Wan Suleiman F.J., Salleh Abas F.J. & Hashim Yeop A. Sani J.) June 7 & November 20, 1981]

[Kota Bahru — Federal Court Civil Appeal No. 56 of 1981]

Practice and Procedure — Order to show cause why suit should not be struck out for want of prosecution — No cause shown — Inordinate and inexcusable delay — R.S.C. 1957, O. 36 r. 11(A)(2) — R.H.C. 1980, O. 34 r 8(2).

The appellants commenced a civil suit on February 22, 1975 against the respondent for fraudulent breach of trust. The respondent filed his defence on May 5, 1975. Since the filing of the defence the appellants took no step to set down the suit for trial. On August 26, 1980 the Senior Assistant Registrar, Kuala Trengganu, issued a notice to the parties to attend the Judge's Chambers for the appellants to show cause why the suit should not be struck out for want of prosecution. The parties appeared and the learned judge made an order for the suit to be struck out. The appellants appealed.

Held: (1) the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that (a) the plaintiff's default has been intentional and contumelious or (b) the plaintiff or his lawyer is guilty of such inordinate and inexcusable delay that the defendant has been prejudiced by it;

(2) in this case the appellants having kept the suit in abeyance for five years and three months during which they remained completely inactive and having given no answer nor satisfactory explanation at all as to this inactivity when called upon to do so by the court, were guilty of inordinate and inexcusable delay if not also of intentional and contumelious conduct which entitled the court to dismiss their action for want of prosecution.

Cases referred to:

(1) *Vasudevan* v. *Damodaran & Anor.* [1981] 2 M.L.J. 150.

(2) *Biss* v. *Lambeth* [1978] 1 W.L.R. 382.

(3) *Joyce* v. *Joyce* [1978] 1 W.L.R. 1170.

(4) *Birkett* v. *James* [1977] 3 W.L.R. 38, 45.

FEDERAL COURT.

Vinayak Pradhan for the appellants.

V.K. Palasuntharam (*S. Kulasegaran* with him) for the respondent.

Salleh Abas F.J. (delivering the judgment of the Court): On February 22, 1975 the appellants commenced a civil suit against the respondent for fraudulent breach of trust. Their statement of claim alleged that by an order of the High Court dated October 2, 1951, the respondent, who is the appellants' uncle, became the registered owner of a piece of land as a trustee for the benefit of the appellants. In June 1973 the land was transferred to the appellants. During the period between October 2, 1951 and June 1973, the trust land was managed by the respondent and it was in respect of his management or mismanagement of the land that the appellants sued the respondent for fraudulent breach of trust and asked for an account of all moneys received and expended during the period of his stewardship. The respondent filed his defence on May 5, 1975, admitting that he was a trustee during the period, but denying that he ever committed any breach of trust. Since the filing of the defence the appellants took no step to set the suit down for trial. It remained in abeyance until on August 26, 1980 when the Senior Assistant Registrar High Court, Kuala Trengganu acting under Order 34 rule 8(2) of the Rules of the High Court 1980 issued a notice to the parties and their solicitors to attend